No. 95-1717

In The

Supreme Court of the United States

October Term, 1996

UNITED STATES OF AMERICA,

Petitioner,

v.

DAVID W. LANIER,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

SUPPLEMENTAL BRIEF

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SUPPLEMENTAL BRIEF ON BEHALF OF THE RESPONDENT

The Respondent files this supplemental brief to call the Court's attention to a decision rendered by the Sixth Circuit Court of Appeals on September 11, 1996. *Archie v. Lanier,* 95 F.3d 438 (6th Cir. 1996) was an action brought under 42 U.S.C. § 1983, involving some of the assaults that are the subject of the present case. The Respondent had filed a *pro se* appeal from a ruling of the district court rejecting his defense of judicial immunity. The Court of Appeals affirmed, holding that his commission of the assaults could in no way be considered "judicial acts". In reaching this conclusion the Court applied essentially the same standard the Respondent has asserted in his "color of law" and "state action" arguments in the present case. Although the *en banc* Sixth Circuit decision in the present case did not reach the color of law/state action argument, it is evidence that the three members of the Court who joined in the *Archie* opinion would have held that the Respondent's actions were not committed under color of law, and did not constitute state action, had the issue been reached. Pertinent excerpts from the *Archie* opinions follow:

> "[W]e look to the particular act's relation to the general function normally performed by a judge" to determine whether the action complained of was indeed a judicial act. Ultimately, it is the "nature" of the function performed, rather than the identity of the person who performed it, that informs a court's immunity analysis.
>
> * * *

We hold that stalking and sexually assaulting a person, no matter the circumstances, do not constitute "judicial acts". The fact that, regrettably, Lanier happened to be a judge when he committed these reprehensible acts is not relevant to the question of whether he is entitled to immunity. Clearly he is not.

95 F.3d at 441.

* * *

In *United States v. Lanier* . . . the criminal analog to this civil case, we held that Lanier's conduct, the same conduct complained of here, does not constitute a federal crime under 18 U.S.C. § 242.

In that case, the government argued that Lanier's sexual assaults were made as a judicial official, "under color of state law," an explicit requirement or element of a § 242 offense. In order for Lanier to be found criminally liable under § 242, "state action" must be present. A § 242 act "under color of state law" must be an act "under pretense of law" for "the acts of officers in the ambit of their personal pursuits are plainly excluded." (Citation omitted.) It must be a "misuse of power . . . made possible only because the wrongdoer is clothed with the authority of the law . . . " (Citation omitted.) The sexual conduct here was singularly "personal" and obviously not "clothed with the authority of law."

* * *

It would seem inconsistent to follow the government and say [in the § 242 case] that Lanier was performing a judicial function under state law for purposes of criminal liability and then turn around and deny Lanier judicial immunity on

the ground that he was not performing a judicial function.

The only consistent, sensible approach in this area of law is to say what seems obvious: Sexual assaults have nothing to do with the appearance of carrying out authorized judicial duties, exercising judicial power or performing the function of judging.

95 F.3d at 443, 444 (Concurring opinion).

The Respondent submits this authority because it throws additional light upon the color of law/state action issue, and tends to refute any implication that the Sixth Circuit majority opinion in the present case implicitly found that the Respondent was acting under color of law or was a state actor.

Respectfully submitted,

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